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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 67

J. I. CASE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 57–62) is reported in 134 F. (2d) 70. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 9–28) are reported in 42 N. L. R. B. 85. The decisions of the Board in a prior representation case which forms a part of the record in this case are reported in 38 N. L. R. B. 522 and 39 N. L. R. B. 412.

JURISDICTION

The decree of the circuit court of appeals was entered on March 17, 1943 (R. 62–64). The petition for a writ of certiorari was filed on May 21, 1943, and was granted on June 21, 1943. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1935, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's order, requiring petitioner to cease and desist from its unfair labor practices, to bargain collectively with the union, and to cease from giving effect to its individual contracts and from entering into similar forms of contracts, became moot upon the expiration of the contracts and upon petitioner's entry into a collective bargaining contract.

2. Whether, after the Board has certified an exclusive collective bargaining representative, an employer may refuse to bargain collectively with respect to the terms and conditions of employment covered by individual contracts theretofore executed with a majority of its employees.

3. Whether, when an employer has utilized individual contracts of employment, valid in origin, to interfere with its employees' rights under the Act, the Board may order the employer to cease and desist from giving effect to such contracts and from entering into similar contracts.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in Appendix A, *infra*, pp. 51–55.

STATEMENT

After appropriate proceedings, in which all material facts were stipulated by the parties, the Board issued its findings of fact, conclusions of law, and order (R. 9–28). The undisputed findings may be summarized as follows:

Since 1937, petitioner has annually offered its employees at its Rock Island plant individual contracts fixing terms of employment for a year (R. 18–19, 30–31). These contracts contain among others the following provisions: Petitioner agrees to furnish employment as steadily as conditions permit and to pay a specified rate to the contracting employee, reserving, however, the right to determine new rates in the event the employee's job is changed. The employee agrees to accept the terms provided, to comply with petitioner's factory rules,[1] and "to faithfully and honestly serve" petitioner for the term of the contract. (R. 19, 34–36). At all times since 1937, about 75 percent of the employees were parties to such contracts (R. 18–19, 31).

On November 7, 1941, while the individual contracts executed August 1, 1941, were still in effect,

[1] The rules provide that "working hours will be announced by appropriate notices on company bulletin boards or by the foreman" (R. 39); state that the company has adopted a vacation plan, an explanation of which has been published and is available to employees (R. 44); and describe in detail the manner in which employees are hired, the safety rules to be followed, and procedures observed at the plant (R. 36–45).

the Union[2] petitioned the Board for certification as the exclusive bargaining representative of the production and maintenance employees in the plant (R. 17–18). On December 17, a hearing was held (R. 19) at which the company contended that the contracts were a bar to the proceedings because (1) their existence precluded a question concerning representation and (2) their continued effectiveness until July 31, 1942, made such proceedings premature and untimely (Transcript in representation hearings, p. 11).

On the same day, the company sent a circular letter to its employees informing them of the proceedings and recalling that in a previous proceeding (27 N. L. R. B. 1202, 36 N. L. R. B. 614) the employees had rejected the Union's predecessor. The circular announced also that the company had requested the Board to dismiss the petition "on the ground that the company does not believe that any action should affect its rights and the rights of its employees who have signed individual contracts and indicated that they wish to bargain with the company on that basis" (R. 19–20, 31, 46–48).[2a]

[2] International Union, Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O.

[2a] The Board had already ruled in prior proceedings involving a unit composed of the pattern makers at petitioner's Rock Island plant that the individual contracts were not a bar to an election (24 N. L. R. B. 606, 608) and, after the Pattern Makers League received a majority of the votes in the election, had certified it (25 N. L. R. B. 504).

On January 26, the Board issued its Decision and Direction of Election (38 N. L. R. B. 522), rejecting the company's contention and citing its earlier opinion in *Matter of The Gates Rubber Co.* (8 N. L. R. B. 303, 306) which held: "The fact that an employee signs an individual contract cannot be held to reflect the desires of such employee regarding representation and does not constitute any bar to collective bargaining on his behalf."

Pursuant to the Board's direction, an election was held among the company's employees on February 13, 1942; 342 votes were cast for the Union and 190 against. Accordingly, on March 3, the Board certified the Union as the exclusive bargaining representative of the employees in question in respect to wages, hours, and other conditions of employment (39 N. L. R. B. 412).[3]

On March 7, 1942, the Union asked petitioner to bargain collectively with it as such exclusive representative. Petitioner, in the words of the stipulation, "refuse[d] to negotiate with the Union as the exclusive representative of all the employees in the unit with respect to rates of pay, hours of employment or other conditions of employment, declaring that [petitioner] could not deal with the Union in any manner affecting

[3] Petitioner does not dispute the appropriateness of the bargaining unit fixed by the Board or the Union's designation by a majority within that unit on and after February 13, 1942 (R. 32–33).

the rights and obligations of [petitioner] and its employees under the individual contracts while the contracts remained in full force and effect." Petitioner stated further that it "would deal with the Union on matters which did not affect the rights of [petitioner] and the employees under the individual contracts, and that it would deal with the Union as the exclusive bargaining agency for all employees in the unit on matters relating to hours, wages, and conditions of employment upon expiration of the individual contracts." (R. 15, 33.)

On March 19, 1942, petitioner again sent a circular letter to each of its employees. It asserted therein that the "validity [of the individual agreements] is not affected by the result of the ballot [in the Board election]." It informed the employees that when the Union representatives "presented a collective bargaining contract for all employees, they were advised that the company could not deal with the Union in any manner which affected the rights and obligations of the company and its employees under the individual contracts while these contracts were in existence." (R. 19–20, 31, 52.)

Upon the foregoing facts the Board found that petitioner had failed to bargain collectively as required by Section 8 (5) of the Act. It held (R. 21–22):

> The duty [to bargain collectively] is necessarily paramount to the freedom of con-

tract which the employer may have enjoyed prior to the enactment of the statute or before the collective agent has been chosen. Until such representative is designated, the employer may, of course, deal individually with his employees concerning any aspect of the employment relationship so long as he does not exact terms repugnant to the Act and does not offer the contracts for the purpose of infringing rights under the Act. The employee is not, however, presumed thereby to have surrendered his right to collective bargaining during the period of his individual agreement. The right and its correlative duty are merely in abeyance pending the choice of a collective agent. When once a majority of the employees have exercised their right to choose a representative for concerted bargaining in an appropriate unit, the employer's statutory obligation to deal exclusively with such representative as to all terms and conditions of employment is immediate and unconditional and its performance may not be deferred or qualified by reason of any individual bargain which he may have made with his employees. Nor may the employer, contrary to the Board's determination, limit the bargaining unit to the noncontracting employees and thereby arrogate to himself a power lodged exclusively in the Board. Any attempt by the employer to curtail the collective agent's power or to compel individual bargaining

under the contracts constitutes an obstruction to the rights guaranteed by the Act. The Board accordingly concluded that petitioner "by insisting that those who signed contracts wish to bargain on an individual basis and by refusing to deal with the Union with respect to terms and conditions covered by the individual contracts, has failed to bargain collectively within the meaning of the Act" (R. 23).

The Board also found that the circular letters of December 17, 1941, and March 19, 1942, were intended by petitioner to divert the employees from further support of the Union by advising them that petitioner would refuse to deal with the Union as their full statutory agent (R. 23). The Board concluded that petitioner, by setting these contracts up as an excuse for not bargaining collectively and by so notifying its employees, had utilized the contracts to interfere with and impede the self-organization of its employees in violation of Section 8 (1) of the Act (R. 23).

Upon these findings, the Board ordered petitioner to cease and desist from its unfair labor practices and to bargain collectively with the Union. Because the contracts had been utilized to interfere with the employees under the Act, and since the Board "consider[ed] such contracts to constitute a continuing obstacle to the full exercise of the right to collective bargaining," the Board further directed petitioner to

cease and desist from giving effect to the individual contracts or entering into similar forms of contract, and to notify the signatory employees that the contracts would not be enforced, that the said employees would not be expected to deal with petitioner individually by virtue of the contracts, and that the discontinuance of the contracts was without prejudice to the assertion of any legal rights the employees might have acquired thereunder (R. 25–27).

On November 2, 1942, the Board filed its petition for enforcement in the court below (R. 53–56), and on February 26, 1943, the court handed down its opinion enforcing the Board's order, with a modification as to the scope of the cease-and-desist provision (R. 57–62). An appropriate decree was entered on March 17, 1943 (R. 62–64).

SUMMARY OF ARGUMENT

1. The case is not moot. Both the Board and the court ordered petitioner to cease and desist from its unfair labor practices, not to enter into similar forms of contract in the future, and upon request to bargain collectively with the Union. Thus, notwithstanding the expiration of the individual contracts, a continuing order is in effect which governs certain aspects of petitioner's future conduct. The case is indistinguishable from *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257.

2. The obligation "to bargain collectively" includes the obligation to recognize the exclusive

bargaining representative as having the power to represent all employees in the unit and agree with the employer respecting all terms and conditions of employment. The recognition which the employer must accord the exclusive bargaining representative requires that the employer treat with that representative, admitting that its employees will be bound by a contract thus collectively negotiated and that such contract will supersede any individual contracts theretofore made and preclude the making of any individual contracts during the term thereof. This meaning of the term is supported by the words of the statute, its legislative history, the definitions placed thereon by economists and experts in labor relations, and by the uniform decisions of the Board and the courts interpreting the Act. In refusing to negotiate with the Union respecting the terms and conditions of employment covered by individual contracts with a majority of employees in the unit petitioner refused to bargain collectively.

The statutory duty to bargain collectively cannot be suspended by private contracts between the employer and his employees. The premise upon which the Act is based, as shown by its stated purpose and legislative history, is that the individual employee is unable to bargain with his employer on equal terms. To remedy that inequality, the Act makes it the duty of the employer to bargain collectively with his employees through their chosen representative. If the employer by

individual contracts with his employees could suspend this duty for the duration of the contracts he could restore the very inequality which the Act was designed to overcome.

Therefore there is no impropriety in giving effect to the statute, which states no exception to the employer's statutory duty to bargain collectively with the employees' chosen bargaining agent. The court decisions, including those of this Court, support this construction and remove the constitutional doubts expressed by petitioner. Consequently the petitioner was not justified in refusing to bargain collectively during the life of the individual contracts, and that refusal was, as the Board found, an unfair labor practice.

3. The remedies selected by the Board were appropriate to remove the effects of this unfair labor practice. The Board had a basis in the evidence for its judgment that the contracts presented a barrier to the collective bargaining contemplated by the Act; this in turn was a basis for the judgment that petitioner must be prevented from enforcing the contracts or making similar new ones.

Even in the absence of the Board order, petitioner would not be justified, in the presence of the collective bargaining agent, in offering its employees individual contracts covering terms of employment. Both the legislative history of the Act and judicial authority show that such activity would constitute an unfair labor practice since it

would be an attempt to bypass the collective bargaining machinery.

ARGUMENT

I

THE CASE IS NOT MOOT

In its order granting the writ of certiorari the Court requested counsel to discuss the question whether the case is moot. In our opinion the case is not moot.

Both the order of the Board and the decree of the court required, among other things, that petitioner cease and desist from "* * * entering into any similar form of contract with its employees for any period subsequent to the date of this" decision or decree (R. 25, 62);[4] and from "refusing to bargain collectively with" the Union "in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment" (R. 25–26, 62–63). In addition, both the Board and the court ordered that petitioner "upon request, bargain collectively with" the Union "in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment" (R. 26, 63–64).

[4] The Board construes this provision (see *infra*, pp. 47–49) as prohibiting only such contracts as might interfere with collective bargaining. While this construction may narrow the scope of the order somewhat, it does not remove all restriction from petitioner's future conduct and, therefore, does not, contrary to petitioner's suggestion (Br. 22), make the cause moot.

Thus, notwithstanding the expiration of the individual contracts, both the Board's order and the court's decree require petitioner to fit its future conduct to a prescribed pattern, the latter under pain of contempt. The Board's order is a continuing one and the court's decree enforcing it is also continuing. Hence the case was not moot when it was decided by the court below and is not now moot. *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, is indistinguishable.[5]

Because there is here a continuing order, it is unnecessary for the Court to consider whether in its absence the case would be governed by *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, on the one hand, or by *St. Pierre* v. *United States*, 319 U. S. 41, on the other. The latter case was held moot after the prisoner's sentence had been served notwithstanding the expected recurrence of an identical sen-

[5] In No. 130, *Matter of J. I. Case Co.*, decided July 22, 1942, 10 L. R. R. 721, the National War Labor Board ordered petitioner to enter into collective agreements and to discontinue obtaining individual contracts. In its letter of August 3, 1942, petitioner advised the War Labor Board it would comply for the duration of the war only, reserving, however, "the right to assert any legal question in an appropriate proceeding." However, this Court held in *Federal Trade Commission* v. *Goodyear Co.*, *supra*, at p. 260, that "Discontinuance of the practice * * * found to constitute a violation of the Act did not render the controversy moot." To the same effect, see *National Labor Relations Board* v. *Greyhound Lines*, 303 U. S. 261, 271, holding that compliance with a Board order containing continuing restraining provisions does not render a review of the order moot.

tence, because means would be at hand whereby the validity of the subsequent sentence could be determined without that sentence first becoming moot. In the former case the question was recurrent though the particular order had expired, but the Commission could if it chose whenever the question recurred enter short term orders which would expire before judicial review could be obtained. In these circumstances this Court held that the former case was not moot.[6] In the instant case, petitioner could, in the absence of a decree forbidding such action, enter into successive short term individual contracts which would expire before the Board could obtain enforcement from the Circuit Court of Appeals. As judicial review and enforcement could thus be forestalled, the instant case would seem, in the absence of the continuing order, to resemble more closely the *Southern Pacific Terminal* case, which was held not moot, than the *St. Pierre* case. However, in view of the fact that here, as in *Federal Trade Comm.* v. *Goodyear Co., supra,* there is a continuing order and hence a subject on which the judgment of this Court can operate (cf. *St. Pierre* v. *United States, supra,* at p. 42), this case does not present the more difficult question of whether in the absence of the continuing order the case would be moot.

[6] To the same effect, see *Gay Union Corp. v. Wallace*, 112 F. (2d) 192, 195 (App. D. C.), certiorari denied, 310 U. S. 647.

II

THE EXISTENCE OF THE INDIVIDUAL AGREEMENTS DID NOT EXEMPT PETITIONER FROM THE DUTY TO BARGAIN COLLECTIVELY WITH RESPECT TO TERMS OF EMPLOYMENT COVERED THEREBY

Petitioner concedes that at the time the Union requested it to bargain collectively the Union was the duly designated exclusive representative of its employees for purposes of collective bargaining.[1] It further concedes that when the Union presented it with a draft of a proposed collective bargaining contract and sought to negotiate with respect to it, petitioner refused on the ground that the terms of employment of a majority of its employees had already been fixed by individual contracts running for a definite period of time which had not yet expired (Br. 4–5). Petitioner did offer to negotiate with the Union respecting any matters which did not affect any rights it or its employees might have under the individual contracts and also to negotiate respecting those matters when the individual contracts expired (Br. 4–5).

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[1] While petitioner contended in the representation proceeding that the existence of individual contracts made it improper for the Board to conduct an election or certify a representative during their term, in this Court petitioner waives this point, stating "no question is presented regarding the representation proceeding or the Certification of Representatives" (Br. 4).

In this Court petitioner maintains that its conduct[8] did not constitute a refusal to bargain collectively within the meaning of the Act, in that Congress was dealing solely with the subject of collective bargaining, not with the subject of individual bargaining when it enacted the Act (Br. 10–13, 15). Petitioner asserts that the Act makes the representative chosen by a majority of the employees the representative of all the employees only for "collective" bargaining, thereby leaving any employee free even after such a representative has been chosen, to engage in "individual" bargaining (Br. 10–11). From this petitioner reasons that collective bargaining is merely applicable to employees who do not elect to make individual contracts (Br. 12) and that its offer to negotiate with the Union as to all matters and employees not covered by the individual contracts satisfied its obligation to bargain collectively (Br. 7).

A. CONGRESS INTENDED THAT THE DESIGNATED REPRESENTATIVE SHOULD HAVE THE POWER TO CONTRACT ON BEHALF OF ALL EMPLOYEES WITHIN THE UNIT

The Board and the court below both rejected petitioner's construction of the Act. They held

[8] Petitioner has incorrectly stated the basis of the Board's finding of a refusal to bargain collectively. Thus, petitioner states that "The unfair labor practice charged to respondent in connection with its refusal to bargain collectively, arose out of a communication by the Company to its employees reporting to them what had taken place between the Company and the Union representatives" (Br. 5). As clearly appears in the Board's decision (R. 18, 21–23), the finding that the petitioner refused to bargain collectively was based on the stipulated fact that petitioner refused to negotiate with the Union respecting matters covered by the individual contracts of employment (R. 33).

that Section 9 (a) of the Act in providing that the representative chosen by a majority of the employees in the unit should be the exclusive representative of all the employees in the unit for purposes of collective bargaining vested in such representative the power to bind the employees, not only to the exclusion of any other agency for collective bargaining but also to the exclusion of any individual bargaining during the pendency of the exclusive representative (R. 21–23, 58-61).[9] Under this construction of the Act, it was, as both the Board and the court below held (R. 23, 59–60), petitioner's duty to bargain collectively with the designated representative respecting all the terms and conditions of employment of all its employees, including all matters covered by the previously executed individual contracts.[10] Since the

[9] Acceptance of the position that Congress intended to exclude individual bargaining during the pendency of a designated representative merely means that the employer has no right to insist on individual bargaining if the representative chosen desires to preempt the field. It does not mean that the representative need exercise its power to exclude individual bargaining. Indeed, in instances where an employer accepts the principles of the Act, the union may agree that individuals are to bargain individually as to various matters which do not lend themselves to standardization. See footnote 18, pp. 27–28, *infra*.

[10] In its brief before this Court (Br. 7, 15) petitioner contends that the decision below means that individual contracts are superseded by the act of designating a collective bargaining representative. This contention misconceives the Board's decision. The Board did not hold that the des-

designated representative is by statute vested with power to bind all employees in the unit, petitioner's fears (Br. 14–15), that it will be required "to bargain collectively on all subjects and contract in a way which may conceivably violate [its] obligation to individual employees within the bargaining unit, and thereby confer upon them a right of action for breach of contract", are entirely groundless. The terms of a collective contract negotiated by the collective bargaining representative will bind each employee to the same extent as if he had himself amended or rescinded the individual contract.

The construction placed on the Act by the Board and the court below in this case is fully supported by the language of the Act, its legis-

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ignation itself had any effect upon the contracts into which any of the employees, individually or otherwise, had entered. It merely held that the effect of the designation was to vest in the representative the power to bind all employees to any terms respecting the employment relationship which the representative and the employer might include in any contract. If the petitioner had bargained with the Union in good faith proceeding upon the premise that the Union had full power to supersede the individual contracts either completely or to the extent of any inconsistent terms in any collective contract to which the employer might agree and no such contract had been signed, the individual contracts would have been left in full effect. If such a contract had been signed, the individual contracts would have been superseded only to the extent therein provided or to the extent the collective contract contained inconsistent terms. The order of the Board abrogating the contracts was entered only because petitioner utilized the individual contracts to defeat collective bargaining.

lative history, the meaning of the term "collective bargaining" accepted by economists and experts in the field of labor relations at the time Congress adopted that term, and the uniform interpretations of the Act by the Board and the courts. These sources establish that collective bargaining as a system excludes the fixing of terms of employment by individual bargaining during the pendency of a designated representative and presupposes the recognition by the employer of the power of the labor organization to exercise to the exclusion of the individual employees all powers which they would have had in the absence of the designation by the majority of a collective bargaining representative.

The purpose and language of the Act.—The purpose of Congress to encourage the development of collective bargaining as a substitute for individual bargaining because individual bargaining lacked the stability essential to keep the channels of commerce free from obstruction is set forth in Section 1 of the Act:

> SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest * * *.
>
> *The inequality of bargaining power* between employees * * * and employers * * * substantially burdens and affects the flow of commerce * * *.

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury * * * by removing certain recognized sources of industrial strife and unrest, * * * *by restoring equality of bargaining power between employers and employees.* [Emphasis supplied.]

It is evident from the background of the policy here expressed, that by the inequality of bargaining power, thus explicitly declared to be a major consideration in the enactment of the statute, Congress had in mind, not a mere disparity in strength between the individual employee and his employer, but rather a complete incapacity of the employee to participate in the process of realistic negotiations with his employer. As far back as 1898, this Court had noted that, in dealings between the industrial employer and the individual employee, bargaining power is so grossly disproportionate as to result in no bargain at all; that "in other words, the proprietors lay down the rules and the laborers are practically constrained to obey them." *Holden* v. *Hardy*, 169 U. S. 366, 397.[11] Congress itself had an-

[11] This fact, first announced in *Holden* v. *Hardy*, 169 U. S. 366, where this Court sustained a state statute limiting the miners' workday to 8 hours, has been the basis of succeeding decisions: *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, re-

nounced a like finding in the Norris-LaGuardia Act (40 Stat. 70, 29 U. S. C., Sec. 102), that "under prevailing economic conditions * * * the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." And the Senate Committee report on the proposed National Labor Relations Act declared that "the second major objective of the bill is to encourage, by developing the procedure of collective bargaining, that equality of bargaining power which is a prerequisite to equality of opportunity and freedom of contract" (Senate Report No. 573, 74th Congress, 1st Session, p. 3). In short, Congress recognized, as had this Court before it, that the "bargaining" which takes place between an employer and an individual employee is illusory, and that the "contracts" thus negotiated are merely statements of the employer's take-it-or-leave-it terms.

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quiring cash redemption of evidence of indebtedness issued in payment of wages; *Patterson* v. *Bark Eudora*, 190 U. S. 169, forbidding advance payment of seamen's wages; *McLean* v. *Arkansas*, 211 U. S. 539, prohibiting agreements to pay miners on the basis of the weight of screened coal; *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 567, prohibiting contracts limiting liability for injuries to employees; *Bunting* v. *Oregon*, 243 U. S. 426, limiting hours of work of factory employees; *N. Y. Central R. Co.* v. *White*, 243 U. S. 188, and *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, sustaining workmen's compensation laws; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, sustaining a minimum wage law.

Moreover, in sustaining the constitutionality of the Act this Court said [12] (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33):

> Long ago we stated * * * that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

Thus the purpose to which the Act was directed forecloses the construction which petitioner urges. Petitioner's interpretation would permit the individual employee, while subject to the very bargaining impotence to which the legislation is addressed, to "contract" away the protection which the Act affords him. The error of this interpretation is evident. It rests upon the irrational assumption that Congress, while finding the individual employee incapable of realistic bargaining without collective action, nevertheless intended to leave him capable of bargaining away, at the threshold, his statutory right to collective bargaining.

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[12] Repeating a statement by Chief Justice Taft in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209.

Section 9 (a) of the Act, by providing that the representative chosen by a majority of the employees shall be the exclusive representative of all the employees in the unit, with the single exception that employees may present grievances,[12a] evidences the Congressional intent to supersede individual by collective bargaining. The proviso that employees may themselves present grievances would have been unnecessary if Congress had intended that employees could bargain individually, for anyone who could bargain for himself could *a fortiori* present a grievance.

The legislative history.—The intent of Congress that Section 9 (a) should eliminate all individual bargaining was expressly stated in both the House and Senate Committee reports on the Act. The House Committee said:

> Section 9 (a) incorporates the majority rule principle * * *. As a necessary corollary it is an act of interference (under sec. 8 (1)) for an employer, after representatives have been so designated by the majority, to negotiate with individuals or minority groups in their own behalf on

[12a] See Opinion of General Counsel of the Board, 13 L. R. R. 142, pointing out that Congress intended that individual employees be permitted to "present" grievances but not to settle them without the participation of the collective bargaining representative, and discussing the legislative history on which that conclusion was based.

> the basic subjects of collective bargaining.[13] * * * There cannot be two or more basic agreements applicable to workers in a given unit; * * * If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men per-

[13] A contemporaneous statement as to what would not be considered "basic subjects of collective bargaining" is found in Twentieth Century Fund, Inc., *Labor and the Government*, New York (1935), pp. 229-230: "There is not always a clear-cut division between negotiating with individuals or minority groups, which an employer is not permitted to do, and conferring with them, which he may do. However, the spirit of this and other similar findings and rulings (*Matter of Houde Engineering Co.*, 1 N. L. R. B. (old) 35, and other decisions of the Labor Board established to enforce Section 7a of the National Industrial Recovery Act, 15 U. S. C., Sec. 701 *et seq.*) indicates that an employer may enter into a collective agreement governing wages, hours and basic working conditions only with the representatives of the majority; but that he may confer with any individual or group in respect to grievances over the interpretation and enforcement of a collective agreement which affect only that individual or group. And he may also confer with and deal with any individual or group over matters not covered by the collective agreement and not part of wages, hours and basic working conditions—such as insurance, stock-purchase plans and social welfare." See also statement by the Twentieth Century Fund, Inc., presented to the Senate during the hearings on the Act, Hearings, Senate Committee on Education and Labor, 74th Cong., 1st Sess., on S. 1958, pp. 722–723.

> forming comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.[14]

Similarly the Senate Committee reported:

> Majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all.[15]

The position taken by Congress was based on the testimony of experts. During the hearings preceding the enactment of the Act,[16] Mr. Francis Biddle, who at that time was chairman of the old National Labor Relations Board under Public Resolution No. 44, testified:

> The experience of this Board in the cases before it has indicated that the insistence of the employer on individual bargaining has been for the purpose of interfering with collective bargaining and not for the pur-

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[14] 74th Cong., 1st Sess., H. Rep. No. 1147, p. 20.

[15] 74th Cong., 1st Sess., S. Rep. No. 573, p. 13. Senator Wagner, sponsor of the bill, made substantially the same statement on the floor of Congress during the debates which led to adoption. 79 Cong. Rec. 7571.

[16] In these hearings everyone assumed that the intent and effect of Section 9 (a) was to prevent the existence of minority and individual agreements alongside the statutory contract. All witnesses agreed that this was the case, differing

pose of preserving the individual liberty of contract of the American workman."

Expert opinion.—Economists and experts in the field of labor relations in describing the system of collective bargaining point out that an essential feature is the use of collective action to the exclusion of any individual dealing (Appendix B,

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only in their views on the merits of the proposal. See, e. g., Senate Hearings, 74th Cong., 1st Sess., on S. 1958:

Pro: Senator Wagner, p. 43; Francis Biddle, p. 81; H. A. Millis, p. 180. Contra: James A. Emery, p. 261; Grover C. Brown, p. 372; E. J. Poole, p. 374; Henry I. Harriman, p. 465; Wendell E. Whipp, p. 488; James L. Donnelly, p. 511; A. B. Trembley, pp. 548–549; Statement of the Chicago Association of Commerce, p. 749.

[17] Hearings, Senate Committee on Education and Labor, 74th Cong., 1st Sess., on S. 1958, pt. 1, p. 81. The cases before the old Board in which individual contracts were so used are: *Matter of Edward F. Caldwell*, 1 N. L. R. B. (old) 12; *Matter of North Carolina Granite Corp.*, 1 N. L. R. B. (old) 89; *Matter of Whiting Milk Companies*, 1 N. L. R. B. (old) 137; *Matter of Columbian Iron Works*, 1 N. L. R. B. (old) 152; *Matter of Long & Harman, Inc.*, 2 N. L. R. B. (old) 163; *Matter of Poinsatte Auto Co.*, 2 N. L. R. B. (old) 204; *Matter of John E. Lucey Shoe Co.*, 2 N. L. R. B. (old) 251; *Matter of Vincennes Packing Corp.*, 2 N. L. R. B. (old) 433. The present Board has encountered the same use of individual contracts: *Matter of Adel Clay Products Co.*, 44 N. L. R. B. 386, 396, enf'd, 134 F. (2d) 342 (C. C. A. 8); *Matter of Western Cartridge Co.*, 44 N. L. R. B. 1, 7–8, enf'd, 134 F. (2d) 240, 243 (C. C. A. 7), cert. den. October 11, 1943; *Matter of Killefer Mfg. Co.*, 22 N. L. R. B. 484, 497–498; *Matter of Superior Tanning Co.*, 14 N. L. R. B. 942, 957–958, enf'd in this respect, 117 F. (2d) 881 (C. C. A. 7), cert. den., 313 U. S. 559; *Matter of Grower-Shipper Vegetable Ass'n*, 15 N. L. R. B. 322, 347–348, enf'd, 122 F. (2d) 368, 377 (C. C. A. 9); *Matter of Vincennes Steel Corp.*, 17 N. L. R. B.

pp. 56–67, *infra*).[18] Just as the term "collective bargaining" as understood at the time Congress adopted it implied a system including the reduction to the form of a written contract of any agreement reached (*H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 524), so also did the term at that time imply a system whereby the representative chosen by the majority has full and exclusive powers to bind all individuals in the unit. This result is dictated not merely by the technical meaning of the term but by the rationale behind the system. As these authorities conclusively demonstrate, the existence of any area in which individuals may bargain for themselves after a majority selects a representa-

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825, 831–832, enf'd, 117 F. (2d) 169, 172 (C. C. A. 7); *Matter of Norman H. Stone*, 33 N. L. R. B. 1014, 1023, enf'd, 125 F. (2d) 752, 754–756 (C. C. A. 7), cert. den. 317 U. S. 649; *Matter of Williams Mfg. Co.*, 6 N. L. R. B. 135, 143; *Matter of Jahn & Ollier Engraving Co.*, 24 N. L. R. B. 893, 909–911, enf'd, 123 F. (2d) 589, 593 (C. C. A. 7). For a history of the use of the written individual contract as an antiunion device, see Fitch, John. *The Causes of Industrial Unrest*, Harpers (1924), pp. 167–171.

[18] While the system of collective bargaining includes the right of the exclusive representative to bargain on all matters pertaining to the employment relationship to the exclusion of each individual employee, this does not mean that the exclusive representative may not, if it so desires, allow individuals within the unit to bargain individually respecting matters peculiarly of concern to them. During the period prior to the enactment of the Act when many employers bitterly opposed collective bargaining and employees achieved it, not as a right accorded by law, but as a result

tive leads to competition between individuals which immediately breaks down the standards which the majority has obtained for the entire group (Appendix B, pp. 57–63, *infra*). Employer favoritism to those resorting to individual dealing leads to desertion of the union, while employer pressure on individuals to accept employment on less advantageous terms leads union members to fear displacement. In either case, the individual bargaining weakens collective action and results in the strife and disruptions of commerce which it was the object of Congress to prevent.[19]

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of their economic strength, many collective bargaining agreements expressly provided that there should be no individual bargaining during the term of the agreement. U. S. Bureau of Labor Statistics, Bull. No. 419, *Trade Agreements 1925*, pp. 82, 133; Bull. No. 448, *Trade Agreements 1926*, pp. 16, 56, 60, 69, 71, 76, 87, 89; Bull. No. 468, *Trade Agreements 1927*, pp. 53, 71, 79, 142. In fields where the work of the employees in the unit is in certain respects unique it has been customary for both the employer and the union, in recognition of the authority of the union to bind the employees as to all terms, to provide in the collective bargaining contract that during the term of the contract the union will waive its right to exclude all individual bargaining to the extent of allowing individuals to bargain subject to the terms of the contract within a specified limited scope, as, for example, for wages higher than the minimum set in the Newspaper Guild contracts, U. S. Bureau of Labor Statistics, Bull. No. 686 *Union Agreement Provisions* (1942), pp. 263, 268, 269, or in the Musicians contracts, Bull. No. 419, *Trade Agreements 1925*, p. 101; Bull. No. 468, *Trade Agreements 1927*, p. 115.

[19] Mr. Biddle, then chairman of the old National Labor Relations Board, testifying before the Senate Committee, said (Hearings, 74th Cong., 1st Sess., on S. 1958, p. 81): "Actual

This has been the uniform construction placed on the Act by the Board. The problem first arose in *Matter of New England Transportation Company,* 1 N. L. R. B. 130, a case concerning representation in which the facts were almost identical with these in the case at bar. The Board said (pp. 138–139):

> Clearly the first group of "agreements," even if they be considered as legal contracts and not mere statements of a fact, does not in any manner affect the question of representation or collective bargaining. The fact that a definite wage has at one time been agreed upon in writing does not prevent later collective bargaining in respect to wages or any other matter. * * * The existing arrangements between the respondent and some of its mechanical em-

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collective bargaining in industry has always been conducted on the theory that a bargain made with one group in a unit sets the standard for the entire unit, and a wide study of trade agreements has disclosed none which does not attempt to establish uniform conditions throughout the unit. Failure of the employer to give equally advantageous terms to nonmembers of the union negotiating the agreement would immediately result in a marked increase in the union's membership, * * * and, on the other hand, the giving of better terms to nonmembers would result in a strike. It is, therefore, academic and a little silly to discuss the rights of minorities and individuals to negotiate for more favorable terms than those in the collective agreement. The purpose of the bill is to give workmen power to bargain effectively by collective action. It is obvious that they cannot do better by individual action." The House Report substantially adopts Mr. Biddle's testimony; see part quoted, pp. 23–25, *supra.*

> ployees are thus no bar to an election and consequent bargaining by the certified representatives of the employees. These representatives are of course free to bargain concerning changes in existing arrangements since parties may bargain with respect to the termination of existing contracts.

The *New England* case has been consistently followed by the Board.[20] The same principle has been applied by the Board in holding that the employer violated his duty to bargain collectively when, during the time that an exclusive representative was representing the employees, the employer entered into contracts with one or more individual employees.[21]

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[20] *Matter of The Gates Rubber Co.*, 8 N. L. R. B. 303, 306; *Matter of Dain Mfg. Co.*, 29 N. L. R. B. 526, 528; *Matter of Western Cartridge Co.*, 31 N. L. R. B. 888, 890; *Matter of Walter Lantz Productions*, 16 N. L. R. B. 215, 231–232; *Matter of Norman H. Stone*, 22 N. L. R. B. 850, 852–853; *Matter of Item Co., Ltd.*, 31 N. L. R. B. 278, 280–281; Cf. *Matter of Metro-Goldwyn-Mayer Studios*, 7 N. L. R. B. 662, 697.

[21] In these cases the Board has expressly rejected the argument that the decisions of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and *Virginian Railway v. Federation*, 300 U. S. 515, held that "the right to make individual contracts" was a "permissible alternative to the obligation of collective bargaining where the employees have, in accordance with the Act, selected representatives therefor." *Matter of The Stolle Corp.*, 13 N. L. R. B. 370, 381; *Matter of Schierbrock Motors*, 15 N. L. R. B. 1109, 1115. Cf. *Matter of Medo Photo Supply Corp.*,

B. THE COURT DECISIONS UNIFORMLY SUPPORT THE BOARD'S CONSTRUCTION OF THE ACT

The courts which have considered the point under the Act [22] have uniformly sustained the Board's position. Thus in *National Labor Relations Board* v. *Knoxville Publishing Co.*, 124 F. (2d) 875, 881 (C. C. A. 6), in adjudging an employer in contempt of court for refusing to bargain collectively, the court said:

> The intent of the act was to permit an employee to surrender to a collective agent his individual right to bargain with an employer, after which he no longer possesses this right during the life of the contract and the statute requires the employer to deal exclusively with the agent

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43 N. L. R. B. 989, 997, enf'd 135 F. (2d) 279 (C. C. A. 2), cert. granted October 11, 1943, No. 265, this Term; *Matter of The Hanson-Whitney Machine Co.*, 8 N. L. R. B. 153, 159; *Matter of Reed & Prince Mfg. Co.*, 12 N. L. R. B. 944, 959, 976, enf'd 118 F. (2d) 874, 887 (C. C. A. 1), cert. den., 313 U. S. 595; *Matter of Interstate S. S. Co.*, 36 N. L. R. B. 1307, 1321.

[22] No court except the court below in the instant case has been called upon to determine the power of the exclusive representative to bargain respecting valid contracts made prior to its certification. However, this Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, speaking of contracts executed by a union which was not the exclusive representative and which therefore bound only its members, not all employees in the unit, said (p. 239): "the continued operation of the contracts is necessarily subject to the provisions of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise."

of his employees if one has been selected as provided.[23]

The foregoing legislative history, economic authorities and Board and court decisions show that collective bargaining requires that the employer accord the exclusive representative recognition as an agent empowered to act for and bind every employee in the unit in all matters within the field of collective bargaining. When this meaning of the collective bargaining concept is accepted, it is plain that petitioner's conduct fell far short of that required. By asserting that it would not negotiate respecting any of the matters covered by the individual contracts, petitioner removed from the scope of collective bargaining the bulk of the matters about

[23] To the same effect see: *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2); *National Labor Relations Board* v. *Highland Shoe, Inc.*, 119 F. (2d) 218, 221, 222 (C. C. A. 1); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 435 (C. C. A. 7); *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. (2d) 849, 853 (C. C. A. 7), cert. den., 312 U. S. 680; *National Labor Relations Board* v. *Grower-Shipper Ass'n*, 122 F. (2d) 368, 377 (C. C. A. 9); *National Labor Relations Board* v. *North American Aviation, Inc.*, 136 F. (2d) 898, 899 (C. C. A. 9).

For concurring views of commentators, see Rosenfarb, Joseph, *The National Labor Policy*, Harpers (1940), pp. 225–232; Hoeniger, Heinrich, *The Individual Employment Contract Under the Wagner Act*, 10 Fordham Law Rev. 14; Rice, William Gorham, Jr., *The Legal Significance of Labor Contracts Under the National Labor Relations Act*, 37 Mich. Law Rev. 693, 702–703.

which it should have negotiated. Since at the time petitioner had individual contracts with 415 of the 582 employees in the unit, fixing their wages, hours and working conditions, petitioner thus refused to negotiate with the Union respecting the wages, hours and most of the working conditions of the majority of the employees in the unit. By asserting that any contract negotiated with the Union would constitute a breach of its individual contracts, petitioner denied the Union the recognition to which it was entitled. It thereby failed to accept the premise upon which all collective bargaining must proceed, namely, that the exclusive representative has the right to bind any employee in the unit in respect to any contractual provision respecting the employment relationship to which the individual employee if acting in person could bind himself. And finally, as the Board found (R. 22), by attempting to limit the group on behalf of whom it would recognize the Union as a representative with full powers to the 167 employees not covered by the individual contracts, petitioner refused to accept the unit determined by the Board.

The impractical result of petitioner's position is obvious. If its view prevailed, a necessary consequence would be that numerous agreements, each negotiated separately and each completely independent of the other's terms, might exist

coordinately in a single appropriate unit. In the case at bar, for example, petitioner asserted its readiness to contract with the Union as to the wage schedule of the 25 percent of its employees not covered by the agreements, while continuing to give effect to the various wage provisions individually accepted by each of the employees in the remaining group (R. 30, 33). As we have seen, pp. 23–26, *supra*, this is exactly the situation which Congress sought to foreclose.

Indeed petitioner's position in essence becomes one of arguing that the employees contracted not to demand collective bargaining during the term of the contracts. That position overlooks the purpose of the Act (see pp. 19–23, *supra*). The argument is, in any event, foreclosed by the decision of this Court in *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, in which it was held that an employer may not, by express provision in individual contracts with employees, impose limitations upon subsequent collective bargaining with their representatives. The contracts in the *National Licorice* case bound the signatory employees to refrain from requesting a closed-shop or a signed union agreement, and from questioning, through their representatives, the propriety of an employee's discharge. The Court, deeming these provisions to foreclose collective bargaining with respect to matters which "are frequent subjects of negotiation between employer and employees," held that they thereby

"imposed illegal restraints upon the employees' rights to organize and bargain collectively" and that they "stipulated for the renunciation by the employees of rights guaranteed by the Act." Accordingly, the Court sustained the Board's order enjoining the employer from enforcing the contracts (309 U. S. at 360–361, 365).[24] In the instant case, petitioner seeks to give contracts which contain no such express provisions the very restrictive effect which the *National Licorice* case held could not be provided for expressly (R. 33). Manifestly, petitioner cannot accomplish by the mere execution of a contract that which it cannot do by express provision therein.[25]

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[24] Other provisions in individual contracts held to foreclose or limit future collective bargaining were held invalid on the same ground in *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881, 891–892 (C. C. A. 7), cert. denied, 313 U. S. 559; *National Labor Relations Board* v. *Stone*, 125 F. (2d) 752, 756 (C. C. A. 7), cert. denied, 317 U. S. 649; *National Labor Relations Board* v. *Vincennes Steel Corp.*, 117 F. (2d) 169, 172–173 (C. C. A. 7).

Although the contracts in these cases, as well as in *National Licorice Co.* v. *National Labor Relations Board*, *supra*, were tainted by other elements of illegality, the respective decisions expressly held the clauses restricting collective bargaining to be illegal in themselves, apart from other considerations. Thus petitioner's attempted distinction of the *National Licorice* case (Br. 11) is without merit.

[25] Since petitioner's contracts invariably fix wage rates (R. 35), petitioner's contention would foreclose, for their duration, collective negotiations toward the establishment of a wage schedule that would affect the pay of the 415 contractholders. Rate of pay is of course a frequent subject of negotiation between employer and employees; it is the essential subject matter of every contract of employment, the con-

Petitioner's position is moreover untenable for reasons other than those peculiarly applicable to individual agreements. The courts have recognized that even the execution of a collective agreement does not terminate the employer's duty to bargain collectively concerning matters covered in the agreement. This Court has so intimated (*National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342), saying:

> * * * But we assume that the Act imposed upon the employer the further obligation to meet and bargain with his employes' representatives respecting proposed changes of an existing contract * * *.

And *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. (2d) 452, 459 (C. C. A. 7), certiorari denied, 317 U. S. 650, and *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262, 267 (C. C. A. 3), certiorari denied, 314 U. S. 693, have so held. In the light of the express congressional findings previously discussed, it is clear that Congress did not intend to bestow upon an individual contract the restrictive effect upon future collective bargaining which is denied to collective contracts made with the statutory representative.

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sideration for which the workman gives his services. To exclude from negotiations the question of wage rates for 75 percent of the employees in the unit is obviously to take the heart out of collective bargaining.

Moreover, petitioner's reliance on its contracts, in rejecting the Union's request for full collective bargaining, is necessarily based on a premise precluded by uniform judicial authority; to wit, that the acceptance of an individual contract by an employee constituted a waiver of his statutory right to collective bargaining concerning the matters covered in the contract. The courts have consistently held that the Act vindicates public, not private rights,[26] and that neither individuals nor their representatives can waive benefits arising thereunder.[27] The reason that private action to waive the statutory rights cannot be allowed operative effect is particularly evident in the instant

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[26] *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 266–269; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 360, 362–363; *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 150, 151 (C. C. A. 5); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182–183 (C. C. A. 6); *National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d) 306, 312 (C. C. A. 7).

[27] Thus employees cannot by contract waive benefits under a back pay order. *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 113 F. (2d) 232, 235 (C. C. A. 9); *Waterman Steamship Corp.* v. *National Labor Relations Board*, 119 F. (2d) 760, 762 (C. C. A. 5). Nor may a union, although not operating under the bargaining handicap of the individual employee, contract away its right to unlimited recognition, *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 751–752 (C. C. A. 7), cert. denied, 31 U. S. 565, or its right to file charges with respect to prior unfair labor practices, *National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d) 306, 311–312 (C. C. A. 7). Cf. *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 196 (C. C. A. 9).

case, where the asserted waiver resulted from dealings in which the individual was pitted against the employer with all the disparity in bargaining power which the courts and Congress have so forcefully described.

Contrary to petitioner's contention (Br. 8–11), there is no inconsistency between the holdings below and the views of this Court expressed in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44–45.[28] The meaning of

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[28] The portion of the *Jones & Laughlin* opinion relied upon by petitioner is as follows:

"* * * The provision of § 9 (a) that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute. This provision has its analogue in § 2, Ninth, of the Railway Labor Act [as amended (45 U. S. C., Sec. 152, Ninth)], which was under consideration in *Virginian Railway Co.* v. *System Federation No. 40, supra.* The decree which we affirmed in that case required the Railway Company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with anyone other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the Government, the injunction against the company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was 'designed only to prevent collective bargaining with anyone purporting to represent employees' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor

the passage upon which petitioner relies on is made clear by the succeeding paragraph (301 U. S. at 45), in which the Court said that—

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine." * * * The theory of the Act is that free opportunity for negotiation with accredited representatives of employees * * * may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

This language, in context with the remainder of the paragraph and the preceding one, shows that the Court meant only that an employer could hire employees and carry on his business even if the required negotiation failed to produce adequate collective contracts. The Court specifically recognized that "free opportunity for negotiation" was required, which implies necessarily freedom from contractual bars preventing negotiation. Nor is

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contracts, generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the company might 'elect to make directly with individual employees.' We think this construction also applies to § 9 (a) of the National Labor Relations Act [29 U. S. C., Sec. 159 (a)]."

there anything in *Virginian Railway Co.* v. *Federation*, 300 U. S. 515, or in this Court's reference to it in the *Jones & Laughlin* opinion, which carries a contrary suggestion. In the *Virginian Railway* case the Court was faced with a decree which literally construed would have enjoined the employer from entering into individual contracts under any circumstances whatever. The language referred to was used by the Court in pointing out [29] that neither the decree nor the Act concerned should be so construed, since neither would prevent the making of individual contracts whenever there was no exclusive representative designated, nor on matters which had been left by the collective bargaining to individual negotiation, nor on all matters if after sincere negotiations [30] the parties failed to agree on a collective contract.

Finally, if the meaning which petitioner attaches to the quotation on which it relies were properly to be found therein, it would be inconsistent with the subsequent decision in *National*

[29] As the Government had conceded that the decree should not be literally construed. *Virginian Railway* v. *Federation*, 300 U. S. at 548–549.

[30] It is settled that the refusal by the employer to make a collective contract, referred to in the quotation from the *Jones & Laughlin* opinion, is proper only if the employer has first negotiated in a good faith effort to reach an agreement with the designated agent. *National Labor Relations Board* v. *Westinghouse Air Brake Co.*, 120 F. (2d) 1004 (C. C. A. 3); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780 (C. C. A. 9), certiorari denied, 312 U. S. 678; cf. *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 526.

Licorice Co. v. *National Labor Relations Board,* 309 U. S. 350, where this Court held that an employer could not by contract obtain exemption from the statutory duty to bargain collectively.

Petitioner's suggestion that the constitutional protection accorded to liberty of contract necessitates the construction it places on the *Jones & Laughlin* opinion (Br. 12, 23) is unsupportable. Like other constitutional liberties, liberty of contract is not an absolute right. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 347–348. On the very day on which the Court issued its decision in *Virginian Railway* v. *Federation,* 300 U. S. 515, 549, and only two weeks before the *Jones & Laughlin* decision itself was issued, the Court had occasion to express itself fully on the power of the legislature to limit the individual's freedom to contract in the interests of the public welfare. *West Coast Hotel* v. *Parrish,* 300 U. S. 379. More recently, this Court sweepingly affirmed the right of legislative bodies to limit freedom of contract in the public interest. *Olsen* v. *Nebraska,* 313 U. S. 236. Thus there is no occasion to doubt the continued validity of this court's statement in *Federal Radio Commission* v. *Nelson Bros Co.,* 289 U. S. 266, 282, that "* * * the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing [private] arrangements which would conflict with the execution of its policy * * *."

The foregoing authorities would support the application of the restrictions of the Act to petitioner's contracts even if they antedated the enactment of the Act. *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 307–308. Cf. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 399–401. The fact is, however, that these contracts were annual affairs first introduced in 1937; thus they were entered into subject to the already existing statutory duty to bargain collectively should a designated bargaining agent of the employees so request.

To summarize, there is no basis for petitioner's contention that its individual contracts excused it from bargaining fully with the duly designated representative of its employees as to all terms of employment concerning all employees in the concededly appropriate bargaining unit. The obligation to bargain with the statutory representative is plenary within the field defined by Section 9 (a), and the employer may not, by agreement with individual employees, avoid that obligation. The Union was therefore entitled, on March 7, 1942, to full and immediate recognition as the bargaining agent for all employees in the unit, with respect to all "rates of pay, wages, hours of employment, or other conditions of employment." Petitioner, as the Board found (R. 23), "by insisting that those who signed contracts wish to

bargain on an individual basis and by refusing to deal with the Union with respect to terms and conditions covered by the individual contracts, * * * failed to bargain collectively within the meaning of the Act," and thereby violated Section 8 (1) and (5) thereof.

III

THE BOARD'S ORDER IS VALID AND SHOULD BE ENFORCED

In paragraph 1 (a) of its order, the Board directed petitioner to cease giving effect to the individual contracts or to any "modification, continuation, extension or renewal thereof," and "from entering into any similar form of contract * * *" (R. 25).[31] This provision of the order was predicated upon petitioner's use of the contracts to evade its collective bargaining obligations and to interfere with the self-organization of its employees. In addition to finding that petitioner had illegally refused to bargain with the Union, the Board found that, by the letters of December 17, 1941 (at the time of the representation hearing and prior to the election) and March 19, 1942 (following the request to bargain collectively), petitioner had sought to divert its employees from further support of the Union by advising them that such support "would be of no

[31] The decree of the court below enforced this provision (R. 62).

avail, since [petitioner] would refuse to deal with" the Union (R. 23). The Board concluded that, by employing the contracts as an excuse for not bargaining collectively within the meaning of the Act and by circularizing the employees with intent to divert them from collective activity, petitioner had "utilized the contracts to interfere with and impede its employees" in the exercise of their rights guaranteed by the Act (R. 23).[32] In prescribing the remedy the Board said, "since we consider such contracts to constitute an obstacle to the full exercise of the right to collective bargaining, we find it necessary, in order to effectuate the policies of the Act to order the [petitioner] to refrain from enforcing the contracts" (R. 24).[33]

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[32] With respect to the communications, the circuit court said:

"In view of our conclusion, [petitioner's] communications to its employees were improper. Inasmuch as it could not rightfully refuse to bargain because, as it said, it was barred by various individual contracts, and inasmuch as the premise was unsound, it was improper to submit it to its employees as a circumstance influencing their action in selecting or recognizing a bargaining agent. The erroneous conclusion contained in the quoted language of its letter was such as to advise the employees that [petitioner] considered that it had been wrongfully directed to bargain collectively without regard to the existing contracts. In taking this position, as we have seen, it was mistaken, and to bring to bear, as an influential factor upon its employees, the use of the erroneous conclusion was an invasion of that neutrality required of employers in dealing with their employees prescribed by the Act" (R. 61).

[33] The National War Labor Board in directing petitioner to discontinue the individual contracts (see footnote 5, p. 13.

The court below concurred (R. 59–61). It is submitted that upon the undisputed facts, these findings and conclusions were warranted, and that paragraph 1 (a), based thereon, is valid and appropriate. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364, 367; *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881, 892 (C. C. A. 7), certiorari denied, 313 U. S. 559.[34] Petitioner's objection (Br. 14) to the provision in the order that the discontinuance of the contracts be "without prejudice to the assertion of any legal rights the employee may have acquired under such contract" (R. 26) is foreclosed by the decision of this Court in *National Licorice Co.* v. *National Labor Relations Board, supra*, at p. 367, instruct-

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supra) said: "Irrespective of their legality they [the individual contracts] have been an obstacle to sound collective bargaining, and should be discontinued. * * * They do detract from the new [collective] agreement in the sense that suspicion and opposition linger in the minds of the union men." Report and Recommendations of the National War Labor Board Panel, adopted by the National War Labor Board in No. 130, *Matter of J. I. Case Co.*, decided July 22, 1942, digested in 10 L. R. R. Man. 1057, 1059.

[34] Since the order is based upon the finding that the contracts were employed by petitioner as a means of thwarting the policies of the Act, petitioner's invocation of its constitutional right of free speech is without merit. The presence of utterances in a context of unfair labor practice does not preclude the Board from acting to remove the effects of the totality of such practice. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477–478; *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. (2d) 760, 766 (C. C. A. 7), certiorari denied, 313 U. S.

ing the Board to insert that provision in a comparable order.

The continuing aspects of the order which restrain petitioner from entering into "similar form[s]" of contract in the future, are likewise appropriate means to insure that petitioner will bargain collectively in the future. Since, as the Board found, petitioner had in the past utilized the individual contracts to thwart the employees' rights to collective bargaining, it is a reasonable inference that petitioner would do so in the future if not prevented. The order is an appropriate preventive.[35]

This future prohibition is limited to "similar form[s]" of contract—i. e., similar to the form

590; *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 756–757 (C. C. A. 7); *National Labor Relations Board* v. *The Baldwin Locomotive Works*, 128 F. (2d) 39, 50 (C. C. A. 3); *National Labor Relations Board* v. *Federbush Co.*, 121 F. (2d) 954, 957 (C. C. A. 2); cf. *National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d) 306, 309, 311 (C. C. A. 7); *National Labor Relations Board* v. *Lightner Publishing Corp.*, 113 F. (2d) 621, 625 (C. C. A. 7).

[35] Petitioner's offer of compliance for the duration of the war, made to the War Labor Board, is not relevant to the validity of the continuing order. *National Labor Relations Board* v. *Newport News Co.*, 308 U. S. 241, 249–250. The sole issue is the validity of the order under the conditions existing when it was made. *National Labor Relations Board* v. *Hobbs*, 132 F. (2d) 249, 251–252 (C. C. A. 1); *National Labor Relations Board* v. *McLain Fire Brick Co.*, 128 F. (2d) 393, 394–395 (C. C. A. 3); *National Labor Relations Board* v. *Newberry Lumber & Chemical Co.*, 123 F. (2d) 831, 838 (C. C. A. 6); *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 196 (C. C. A. 9); *National*

of contract herein found to have been improperly utilized. This type of contract, it will be noted, is not an agreement between petitioner and an employee fixing special terms of employment of particular interest to the latter, nor do its terms arise out of special bargaining between the employer and the signatory employee. The contract [35] is a uniform printed document (except for the wage figure, which we may reasonably assume to be uniform for all employees similarly situated), and it is distributed among the employees for individual acceptance or rejection *in toto*. The contract is therefore in substance an individually-signed group contract, establishing a normative schedule of basic employment terms for the plant, or at least for the group of employees who expressly accept it. This kind of an "individual" contract may not, even in the absence of a Board order, be directly offered to employees who are represented by a statutory bargaining agent. "To permit the employer to go behind the chosen bargaining agent and [thus] to negotiate with the employees directly" on basic terms of employment normally and prop-

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Labor Relations Board v. *Pure Oil Co.*, 103 F. (2d) 497 (C. C. A. 5); *New Idea, Inc.* v. *National Labor Relations Board*, 117 F. (2d) 517, 526 (C. C. A. 7).

[35] If contract it be. Mr. Reilly, in a special concurring opinion, expressed the view that the contract was unenforceable for lack of mutuality because it bound the employer to nothing (R. 27–28).

erly within the scope of collective bargaining "would result in nothing but disarrangement of the mechanism of negotiation created by the Act, disparagement of the union, whether good or bad, and acute, if not endless, friction, which it is the avowed purpose of the Act to avoid or mitigate." *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2).[37]

The order with respect to "similar form[s]" of contract in the future thus merely enjoins acts already prohibited by the statute in the presence of a statutory bargaining agent.

Petitioner implies (Br. 21–22) that the order perpetually enjoins it from entering into any kind of individual agreement at any time. It thereby expands the scope of the restraint beyond the limits set by the Board itself. The provision in question, as we have seen, is based upon the finding that the contracts were utilized as a means of interfering with rights guaranteed by the Act and constituted an obstacle to collective bargaining. Read in the context of this finding, the requirement of the cease and desist provisions enjoins petitioner only from continuing to derive benefits from the contracts heretofore utilized to forestall collective bargaining and deter self-organization, and from entering into new con-

[37] To the same effect see cases cited footnote 23, p. 32, *supra*. See also the Committee reports, quoted at pp. 23–26, *supra*.

tracts either for the purpose of again thus utilizing them or under circumstances in which similar infringement of the collective bargaining process would be a probable consequence. The paragraph does not prevent petitioner from contracting with individual employees under circumstances which negative any intent to interfere with the employees' rights under the Act. Cf. *National Labor Relations Board* v. *Adel Clay Products Co.*, 134 F. (2d) 342, 345–346 (C. C. A. 8), enforcing 44 N. L. R. B. 386, 402; *Virginian Railway* v. *Federation*, 300 U. S. 515, 548, 549. Thus construed, the challenged requirement is but a reasonable safeguard "to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437. Cf. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461.

The order was properly sustained and enforced below. Moreover, even if there were substantial doubt of the propriety of the remedy chosen by the Board, the court below could not have substituted its own judgment for that of the Board. Cf. *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 227; *National Labor Relations Board* v. *Greyhound Lines*, 303 U. S. 261, 270.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

CHARLES FAHY,
Solicitor General.
VALENTINE BROOKES,
ALVIN J. ROCKWELL,
Attorneys.

ROBERT B. WATTS,
General Counsel,
RUTH WEYAND,
JACOB I. KARRO,
Attorneys,
National Labor Relations Board.

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APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449; 29 U. S. C., Sec. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or

other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective

bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10.

* * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or trans-

acts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings,

by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

APPENDIX B

Statements of Economists and Experts in the Field of Labor Relations Respecting the Relationship of Individual Bargaining to Collective Bargaining

Reports of U. S. Industrial Commission, V. 17, 57th Cong., 1st Sess., H. R. Doc. No. 186, Washington (1901), p. LXXVI:

> The actual process by which the general terms of the labor contract are established by negotiations between employers and organized workingmen directly, is essentially a process of bargaining. The bargaining is collective because the workingmen are organized, and in many instances the employers are organized as well. We cannot speak of collective bargaining properly in cases where individual workingmen negotiate with employers as to the terms of the labor contract. It is, of course, a familiar fact that the individual laborer is usually in a position of inferior economic strength as against the employer in agreeing upon the labor contract. More and more laboring men are tending to get together, to organize, and to negotiate with employers collectively.

Webb, Sidney and Beatrice, *Industrial Democracy*, London (1902 ed.), pp. 173, 177:

THE METHOD OF COLLECTIVE BARGAINING

> The nature of the Method of Collective Bargaining will be best understood by a series of examples.

In unorganised trades the individual workman, applying for a job, accepts or refuses the terms offered by the employer, without communication with his fellow-workmen, and without any other consideration than the exigencies of his own position. For the sale of his labor he makes, with the employer, a strictly individual bargain. But if a group of workmen concert together, and send representatives to conduct the bargaining on behalf of the whole body, the position is at once changed. Instead of the employer making a series of separate contracts with isolated individuals, he meets with a collective will, and settles, in a single agreement, the principles upon which, for the time being, all workmen of a particular group, or class, or grade, will be engaged.

* * * * *

This practice of Collective Bargaining has, in one form or another, superseded the old individual contract between master and servant over a very large proportion of the industrial field. "I will pay each workman according to his necessity or merit, and deal with no one but my own hands,"—once the almost universal answer of employers—is now seldom heard in any important industry, except in out-of-the-way districts, or from exceptionally arbitrary masters.

Mitchell, John, *Organized Labor*, Philadelphia (1903), pp. 3–4:

* * * The "individual bargain," or individual contract, between employers and men means that the condition of the worst and lowest man in the industry will be that

which the best man must accept. From first to last, from beginning to end, always and everywhere, trade unionism stands unalterably opposed to the individual contract. There can be no concession or yielding upon this point. No momentary advantage, however great or however ardently desired, no advance in wages, no reduction in hours, no betterment in conditions, will permanently compensate workingmen for even a temporary surrender in any part of this fundamental principle. It is this principle, the absolute and complete prohibition of contracts between employers and individual men, upon which trade unionism is founded. There can be no permanent prosperity to the working classes, no real and lasting progress, no consecutive improvement in conditions, until the principle is firmly and fully established, that in industrial life, especially in enterprises on a large scale, the settlement of wages, hours of labor, and all conditions of work, must be made between employers and workingmen collectively and not between employers and workingmen individually.

To find a substitute for the individual bargain, which destroys the welfare and the happiness of the whole working class, trade unions were founded. A trade union, in its usual form, is an association of workmen who have agreed among themselves not to bargain individually with their employer or employers, but to agree to the terms of a collective or joint contract between the employer and the union. The fundamental reason for the existence of the trade union is that by it and through it, workmen are enabled to deal collectively

with their employers. The difference between the individual and the collective or joint bargain is simply this, that in the individual contract or bargain one man of a hundred refuses to accept work, and the employer retains the services of ninety and nine; whereas in the collective bargain the hundred employees act in a body, and the employer retains or discharges all simultaneously and upon the same terms. The ideal of trade unionism is to combine in one organization all the men employed, or capable of being employed, at a given trade, and to demand and secure for each and all of them a definite minimum standard of wages, hours, and conditions of work.

Trade unionism thus recognizes that the destruction of the workingman is the individual bargain, and the salvation of the workingman is the joint, united, or collective bargain. To carry out a joint bargain, however, it is necessary to establish a minimum of wages and conditions which will apply to all. By this is not meant that the wages of all shall be the same, but merely that equal pay shall be given for equal work.

Carver, Thomas N., *Principles of Political Economy*, Boston (1919), p. 403:

The fundamental principle involved in the trade-union policy of the present is the substitution of the indispensable group as a bargaining unit for the dispensable individual. Since the group as a whole is indispensable to industry, if they can bargain as a whole the laborers are in a strong position. As a group they cannot possibly be spared. The difficulty, however,

has always been to hold the group together and get them to bargain absolutely as an indispensable group and to refrain from making individual bargains independently of group action.

Hoxie, Robert Franklin, *Trade Unionism in the United States*, New York (1923), pp. 255–257, 287:

There are four main strands to the theory of collective bargaining. The first is a theory of standardization * * * individual or competitive bargaining on the part of the workers means progressive deterioration of wages and conditions of employment. The tendency is for wages and conditions to sink to the level which could be secured through the competitive strength of the weakest worker of the group. The only way to prevent this deterioration is to rule out all competition between the individual workers of the group, both in the making of the bargain with the employer, and in the subsequent interpretation of it and work under it.

This can be done only by the establishment and maintenance of two principles: the principle of uniformity in regard to all the conditions of work and pay where competition direct or indirect can take place between individual workers, and the principle of standardization, or restrictive regulation, by the group, of all changes in conditions of work and pay during the term of the wage contract.

* * * * * *

The result of these assumptions, which are the workers' interpretation of group experience, is the positive economic program of unionism, the broad outline of which may

be put into two propositions: (1) If the wages and conditions of the group are not to sink to what can be commanded by its weakest labor bargainer, they must make the strength of the weakest bargainer equal to the strength of the group. (2) If the wages of the group are to be kept from falling or to be increased, and the conditions of employment maintained or bettered, they must constantly attempt to increase the bargaining strength of the group as against the employers of the group and as against other groups.

How, then, can the unions carry this program into effect? First, how can they make the strength of the weakest bargainer of the group equal to the bargaining strength of the group? If we accept the position of the workers as so far tenable, it is evident that this can be done only by removing the possibility of all competition between the individual workers of the group. The general method devised by the unions for accomplishing this is to substitute collective bargaining for individual bargaining between the employers and the workers.

Watkins, Gordon S., *An Introduction to the Study of Labor Problems*, New York (1922), pp. 332–3:

To prevent this progressive deterioration in the standards of employment and to improve the economic status of the workers, collective bargaining is introduced, which excludes from determination of the labor contract the exigencies of individual circumstances. Collective bargaining substitutes group action for individual action in negotiating, interpreting and enforcing contracts and agreements. Collective bar-

gaining implies certain principles of procedure. (1) Wherever competition may arise among the workers the cardinal principle of true collective bargaining requires uniformity of wages and conditions of work. There must be a uniform minimum of standards below which no member of the group will consent to work, (2) The principle of standardization must be expressed in restrictive regulations that will prevent changes in the terms of the labor agreement during the specific life of the compact.

Catlin, Warren B., *The Labor Problem*, New York (1926), p. 322:

> For all this weakness and subserviency (of the individual worker) collective bargaining substitutes the "common rule." By combining all members of the group, it re-enforces the waiting-power of the individual with the resources of the group. By presenting the demands of all at once, it prevents underbidding and the degradation of wages and other terms according to the exigencies of a few. It is founded upon the maintenance of a common or, at any rate, a minimum standard of living for all members of the group.

Watkins, Gordon S., *Labor Problems*, New York (1929), p. 409:

> The wage-earner's most immediate and practicable approach to a solution of his industrial problems is found in uniting with his fellow workers to substitute group action for individual effort. Thus labor organizations are formed for the purpose of supplanting the individual bargain by the collective bargain.

Cummins, E. E., *The Labor Problem in the United States,* New York (1932), pp. 261–262:

> The laborer has substituted collective bargaining for individual bargaining because individual bargaining is so ineffective. It is true that the individual laborer is bargaining with the individual employer, but the employer has the advantage. To him one laborer more or less is a matter of no great concern particularly when trade is not brisk; and even when it is, he can give up a single employee without any serious inconvenience. To bargain effectively, the bargainer must have something that the other party greatly desires, and must at the same time have no great desire for the other party's commodity. This, except in most unusual circumstances, is not the laborer's position; whereas the employer has something that the laborer wants very much indeed, namely a job, and seldom needs very badly the services of that particular laborer. He can even manage to get along without the services of all of his employees for a period. But the worker has no such alternative. He must have a job or starve. The employer knows this and so he is usually able almost to dictate the terms of the bargain, which naturally will not be formulated primarily to please the employee. It is to reduce this great unevenness of the situation, to place themselves on a footing more nearly equal to that of the employer, that the employees use collective bargaining. Functioning as a unit they do possess something which the employer greatly desires. He may not care whether an individual laborer works for him or not, but

he does care if the entire group withdraws from his plant in a body.

Yoder, Dale, *Labor Economics and Labor Problems*, New York (1933), p. 438:

> In collective bargaining, an employer or an organization of employers deals with an organized group of workers. Individual workers relinquish to their unions the right to represent them in dealing with their employers. They agree not to enter into any personal or private agreement but to subscribe to whatever joint agreements are made. Individual workers subordinate themselves to the organizations to which they belong. All business relationships between employers and employees are concluded by the unions. This is collective bargaining. It is "the procedure by which an employer or employers and a group of employees agree upon the conditions of work." While it is generally thought of as involving a single employer, this is not typical. Groups of bargaining employers are not uncommon, and employers' associations, many of which have been formed for the specific purpose of concluding bargains with workers in particular industries, represent one of the most important elements in modern industrial relationships.

Daugherty, Carroll R., *Labor Problems in American Industry*, New York (1933), p. 415:

> 3. *The benefits of collective bargaining.*—Workers were not long in adopting the only alternative to individual bargaining. The latter, utterly inadequate and almost wholly futile in the face of an unfavorable industrial environment, was gradually supplanted among a large number of employees

by collective action and group solidarity. Workers learned that, if they were to have any real voice in the determination of their wages and working conditions, they would have to act together as a unit and present a united front to their employers. Competition among themselves for jobs would have to cease. The individual bargain must yield to the collective bargain. All employees must accept, in general, standard wages, standard hours, and uniform conditions of work which would be superior to the average obtainable under the old system. In the end each individual would obtain more by submitting to the discipline of the group than by playing a lone hand, because the employer, who could easily do without his particular services, might have to yield to him as one of a united group.

Taylor, Albion G., *Labor Problems and Labor Law*, New York (1938), pp. 86–87:

> Collective bargaining has been defined as "the joint determination of the terms of employment by an organization of workers and an employer, or an association of employers, acting through their duly authorized representatives."
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> * * * * *
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> To protect the worker and improve his economic status, collective bargaining is introduced, substituting group action for individual action in making and enforcing agreements. It is a method positively in conflict with the spirit of individualism, for collective bargaining implies a limitation of the individual worker's freedom to negotiate contracts governing his employ-

ment. This necessary subordination of the will of particular individuals to the collective will is often condemned as an encroachment upon the "natural right" of any person. Interference with individual bargaining is justified by trade unionists and many other people on the ground that it augments the sum total of human happiness, even though it does restrict the liberty of certain individuals.

Collective bargaining is predicated upon a recognition of the union as a legitimate and legal institution with which employers may bargain. "Recognition" constitutes an admission on the part of an employer that his employees have the right to be bound by a contract negotiated by a labor organization to which they belong, rather than by agreements made with each employee as an individual. * * *

Cooke, Morris L. & Murray, Philip, *Organized Labor & Production*, New York (1940), p. 188:

> The recognition of a union for collective bargaining implies not that the employer has taken a position of neutrality, but that he has accepted the principle that individual bargaining will be supplanted by collective bargaining as the procedure by which conditions or (sic) labor will be determined.

Golden, Clinton S. & Ruttenberg, Harold J., *The Dynamics of Industrial Democracy*, New York (1942), pp. 23, 26:

> *Collective bargaining marks the end of individual and the beginning of group relations between workers and management.*
>
> * * * * *

> There is an irreconcilable conflict between union-management bargaining and management bargaining with individual workers. The two cannot exist side by side either peacefully or indefinitely.

Taft, Philip, *Economics and Problems of Labor*, Harrisburg, Penna. (1942), p. 703:

> Collective bargaining necessarily leads to the growth of definite machinery for effectuating it. The size of the groups bargaining will determine the magnitude of the machinery erected for this purpose. However, in all cases collective bargaining means transference of the authority to determine the terms of employment from the isolated individual to the group.

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SUPREME COURT OF THE UNITED STATES.

No. 67.—October Term, 1943.

J. I. Case Company, Petitioner, *vs.* National Labor Relations Board. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 28, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

This cause was heard by the National Labor Relations Board on stipulated facts which so far as concern present issues are as follows:

The petitioner, J. I. Case Company, at its Rock Island, Illinois, plant, from 1937 offered each employee an individual contract of employment. The contracts were uniform and for a term of one year. The Company agreed to furnish employment as steadily as conditions permitted, to pay a specified rate, which the Company might redetermine if the job changed, and to maintain certain hospital facilities. The employee agreed to accept the provisions, to serve faithfully and honestly for the term, to comply with factory rules, and that defective work should not be paid for. About 75% of the employees accepted and worked under these agreements.

According to the Board's stipulation and finding, the execution of the contracts was not a condition of employment, nor was the status of individual employees affected by reason of signing or failing to sign the contracts. It is not found or contended that the agreements were coerced, obtained by any unfair labor practice, or that they were not valid under the circumstances in which they were made.

While the individual contracts executed August 1, 1941 were in effect, a C. I. O. union petitioned the Board for certification as the exclusive bargaining representative of the production and maintenance employees. On December 17, 1941 a hearing was held, at which the Company urged the individual contracts as a bar to representation proceedings. The Board, however, directed

an election, which was won by the union. The union was thereupon certified as the exclusive bargaining representative of the employees in question in respect to wages, hours, and other conditions of employment.

The union then asked the Company to bargain. It refused, declaring that it could not deal with the union in any manner affecting rights and obligations under the individual contracts while they remained in effect. It offered to negotiate on matters which did not affect rights under the individual contracts, and said that upon the expiration of the contracts it would bargain as to all matters. Twice the Company sent circulars to its employees asserting the validity of the individual contracts and stating the position that it took before the Board in reference to them.

The Board held that the Company had refused to bargain collectively, in violation of § 8(5) of the National Labor Relations Act; and that the contracts had been utilized, by means of the circulars, to impede employees in the exercise of rights guaranteed by § 7 of the Act, with the result that the Company had engaged in unfair labor practices within the meaning of § 8(1) of the Act. It ordered the Company to cease and desist from giving effect to the contracts, from extending them or entering into new ones, from refusing to bargain and from interfering with the employees; and it required the Company to give notice accordingly and to bargain upon request.

The Circuit Court of Appeals, with modification not in issue here, granted an order of enforcement. The issues are unsettled ones important in the administration of the Act, and we granted certiorari. In doing so we asked counsel, in view of the expiration of the individual contracts and the negotiation of a collective contract, to discuss whether the case was moot. In view of the continuing character of the obligation imposed by the order we think it is not, and will examine the merits.

Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual

ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade agreement are submitted to a government department and if approved become a governmental regulation ruling employment in the unit.[1]

After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.

But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates.

Concurrent existence of these two types of agreement raises problems as to which the National Labor Relations Act makes no

[1] See Hamburger, "The Extension of Collective Agreements to Cover Entire Trade and Industries" (1939) 40 International Labor Review 153; Methods of Collaboration between Public Authorities, Workers' Organizations, and Employers' Organizations (International Labour Conference, 1940) p. 112.

express provision. We have, however, held that individual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350. But it is urged that where, as here, the contracts were not unfairly or unlawfully obtained, the court indicated a contrary rule in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44-45, and *Virginian Railway* v. *Federation*, 300 U. S. 515. Without reviewing those cases in detail, it may be said that their decision called for nothing and their opinions contain nothing which may be properly read to rule the case before us. The court in those cases recognized the existence of some scope for individual contracts, but it did not undertake to define it or to consider the relations between lawful individual and collective agreements, which is the problem now before us.

Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment, because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue work after a collective agreement expires and, despite negotiation in good faith, the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern. The conditions for collective bargaining may not exist; thus a majority of the employees may refuse to join a union or to agree upon or designate bargaining representatives, or the majority may not be demonstrable by the means prescribed by the statute, or a previously existent majority may have been lost without unlawful interference by the employer and no new majority have been formed. As the employer in these circumstances may be under no legal obligation to bargain collectively, he may be free to enter into individual contracts.[2]

[2] Cf. National Labor Relations Board v. Sands Mfg Co., 306 U. S. 332; National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 297-98; National Labor Relations Board v. Brashear Freight Lines, Inc., 119 F. 2d 379; Hoeniger, "The Individual Employment Contract and Individual Bargain," 10 Fordham L. Rev. 14, 22-25.

Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.

It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.

But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering

with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result. We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices.

It also is urged that such individual contracts may embody matters that are not necessarily included within the statutory scope of collective bargaining, such as stock purchase, group insurance, hospitalization, or medical attention. We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice. But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement.

Hence we find that the contentions of the Company that the individual contracts precluded a choice of representatives and warranted refusal to bargain during their duration were properly overruled. It follows that representation to the employees by circular letter that they had such legal effect was improper and could properly be prohibited by the Board.

One minor matter remains for consideration. The literal terms of the Board's order require the Company to "cease and desist from (a) giving effect to the individual contracts of employment or any modification, continuation, extension or renewal thereof, or entering into any similar form of contract with its employees

for any period subsequent to the date of this decision," and to give written notice to each to that effect and that "such contract will not in any manner be enforced or attempted to be enforced" and that "such discontinuance of the contract is without prejudice to the assertion of any legal rights the employee may have acquired under such contract."

These provisions, it has been argued, go beyond the Board's power, leave employees free to bring but the Company powerless to defend actions on the contract, and prohibit making future contracts even when not obnoxious to the law or to any collective agreement.

The Board, of course, has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction. *National Licorice Co.* v. *National Labor Relations Board, supra.* The Board, however, would construe the order more narrowly than its terms suggest. It says, "The provision in question, as we have seen, is based upon the finding that the contracts were utilized as a means of interfering with rights guaranteed by the Act and constituted an obstacle to collective bargaining. Read in the context of this finding, the requirement of the cease and desist provisions enjoins petitioner only from continuing to derive benefits from the contracts heretofore utilized to forestall collective bargaining and deter self-organization, and from entering into new contracts either for the purpose of again thus utilizing them or under circumstances in which similar infringement of the collective bargaining process would be a probable consequence. The paragraph does not prevent petitioner from contracting with individual employees under circumstances which negative any intent to interfere with the employees' rights under the Act. . . . Thus construed, the challenged requirement is but a reasonable safeguard . . . ."

We agree, but the literal language of the order may well be read in quite different meaning, especially when separated from findings and standing alone in the Court's enforcement order. It then becomes the language of the Court, and the Court would not be bound to look upon the Board's construction as its own. Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings. A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court.

Nor should he be ordered to desist from more on the theory that he may violate the literal language and then defend by resort to the Board's construction of it. Courts' orders are not to be trifled with, nor should they invite litigation as to their meaning. It will occur often enough when every reasonable effort is made to avoid it. Where, as here, the literal language of the order goes beyond what the Board admits was intended, correction should be made. Paragraphs 1(a) and 2(a) of the decree of the court below are hereby modified, by adding the words in italics, to read as follows:

"1. Cease and desist from:

(a) Giving effect to the individual contracts of employment or any modification, continuation, extension, or renewal thereof *to forestall collective bargaining or deter self-organization*, or entering into any similar form of contract with its employees for any period subsequent to the date of this Decree *for such purpose or with such effect*.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Give separate written notice to each of its employees who signed an individual contract of employment or any modification, continuation, extension, or renewal thereof, or any similar form of contract for any period subsequent to the date of this Decree, that such contract will not in any manner be enforced or attempted to be enforced *to forestall collective bargaining or deter self-organization*, that the employee is not required or expected by virtue of such contract to deal with respondent individually *in respect to rates of pay, wages, hours of employment, or other conditions of employment*, and that such discontinuance of the contract is without prejudice to the assertion of any legal rights the employee may have acquired under such contract *or to any defenses thereto by the employer.*"

As so modified the decree is

Affirmed.

Mr. Justice ROBERTS is of opinion that the judgment should be reversed.